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ABSTRACT

The Education for All Handicapped Children Act, Public Law (PL) 94-142, exemplifies the trend in American public policy toward the "legalization" of educational issues previously left to political or professional solution. Such legislation characteristically includes a focus on individual rights, the use of legal concepts and modes of reasoning, and the provision of legal techniques such as written agreements and court-like procedures to enforce and protect rights. In the area of special education, "Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania" marked the end of the first stage of legalization, translating political pronouncements into legal guarantees and precipitating widespread litigation on behalf of the handicapped. The "PARC" and subsequent decisions were crucial in initiating and shaping federal legislative policy involving special education. As the culmination of the legalization process through federal legislation, PL 94-142 emphasizes due process and procedural matters more than it does substantive issues, such as what constitutes an appropriate education. Although such legislation was necessary to bring attention to and legitimate the educational claims of the handicapped, the legalized model should not be relied upon too heavily and could be modified to avoid some of its detrimental effects, including its potential for distorting the allocation of education resources. (JBM)

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THE ALLURE OF LEGALIZATION RECONSIDERED: THE CASE OF SPECIAL EDUCATION

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January 1983

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Abstract

Legalization has been called a major trend in American public life. Yet it is a phenomenon that is conceptually unclear and little understood in the way it affects the institutions on which it comes to operate.

In this paper we look at special education, the subject of major federal legislation in 1975, namely the Education for All Handicapped Children Act. We examine that legislation, the process leading to its passage and implementation as a case study in legalization. We outline our understanding of the concept of legalization and its motivations, and analyze how it has come powerfully to shape this policy area. We then discuss the effects of legalization on the institutions into which it is introduced, in this case the education system, looking both at the use of the due process procedures and the wider contextual setting of legalization in the education sphere.

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A major portion of this research is based on interviews with the principal congressional staff people and lobbyists involved in the passage of the Education for All Handicapped Children Act 1975, PL 94-142. Interviews were conducted in Washington in July and August, 1980, and tape recorded. Interviewees agreed to the interview on the basis that their views were not for attribution. Hence where a quotation appears in the text only the most general reference to the source is given. It should be appreciated that these people were reporting events that had occurred up to eleven years prior to the interview. Some interviewees referred to documents and memoranda, although most did not. We sought to ensure accuracy by cross-checking one report against another where possible and against whatever records were available. By exercising what we trust was a healty skepticism, we hope to have minimized inaccuracy. Nevertheless, most of the people we interviewed still work closely with and have discussed the events among one another. There is a need then, to remain cautious about the data. Finally, we submitted a copy of our draft to two of the principal policy makers for comments and suggested revisions. This methodology has yielded a richer account of the policy making process leading to PL 94-142 than reliance on the records could have done. We want to thank the following persons and organizations who generously made large amounts of their time available to us: Michael Francis, Staff Member for Senator Robert Stafford; James Galloway, National Association of State Directors of Special Education; Thomas Gilhool, Attorney for Pennsylvania Association for Retarded Citizens; Robert Herman, Bureau for Educationally Handicapped; Ronald Howard, National Association of State Boards of Education; John Martin, Council of Chief State Schools Officers; Roy Millenson, Staff Member for Senator Jacob Javits; John Morris, Department of Education; Marilyn Roth, American Federation of Teachers; Gus Steinhilber, National School Boards Association; Lisa Walker, Staff Member for Senator Harrison Williams; Fred Weintraub, Council for Exceptional Children; James Wilson, Pennsylvania Association for Retarded Citizens; Daniel Yohalem, Children's Defense Fund.

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INTRODUCTION

American public policy has recently witnessed the legalization of a host of issues previously left to political or professional solution.[1] The declaration of substantive rights coupled with reliance on law-like procedures, has become a characteristic way of framing policy. While legalization has been studied in a number of contexts - industry,[2] regulation,[3] education,[4] and race relations[5] among them - we lack a precise specification of what the term legalization means, how it comes to dominate an area of policy, and its effects in various contexts.[6]

This article contributes to the understanding of these issues by focusing on special education policy. The capstone of the policy is the Education for All Handicapped Children Act 1975, commonly referred to as Public Law 94-142 (PL 94-142)[7]. Perhaps more than any other law, that Act imposed the forms of law on existing organizations - schools - which have hitherto relied on other bases for decision making.[8]. The genesis of the 1975 federal special education legislation is to be found in the activities of special education interest groups during the preceding two decades. The development of legalization commenced with the struggle to have the claims of the handicapped, initially defined in the political arena, recognized as rights. During the 1960s, in the atmosphere of the civil rights movement and the War on Poverty, the movement shifted its attention from the political sphere to the courts, wresting from the judiciary legal recognition of those rights under the Constitution. Acknowledgement by the courts marks the end of the

first stage of the legalization of special education policy.

Rights cost money. Court-mandated rights generated pressures on state governments for new funding and this in turn led states to demand financial assistance from the federal government. By the time the issue of special education reached the federal level, however, court pronouncements had already importantly shaped its contours. Later policy decisions bore the mark of those initial formulations. The logic of legalization carried through into the more political phases of policy making, constraining some policy options, precluding others and suggesting measures compatible with the legal ideas already contained in the court decisions. As a result, PL 94-142 emerged with a full set of due process procedures premised on the right to free appropriate public education for all handicapped children which had been enunciated by the courts. Congress elaborated this right by means of a quasi-contractual device known as the individualized education plan (IEP), a written document to be developed jointly by parents and educators for each child. The integrity of this process was protected by a right to a hearing if the parents were dissatisfied, and a right of appeal from that hearing. These are the concepts and procedures we refer to when we speak of legalization of special education.

Special education is an ideal case from which to mount a study of legalization. From the first articulated claims to the recognition of the rights of the handicapped to education, the development of the policy at the federal level, and the implementation of that policy in schools, we can trace the

evolution of the phenomenon and analyze the appropriateness of this style of policy making to its policy setting. Before undertaking that analysis, however, a fuller treatment of the process we have characterized as legalization, comparing it to other policy making styles, is in order.

I LEGALIZATION

Legalization is only one of several modes of giving substance to a policy objective[9] and one which, at least in the fully developed form it takes in PL 94-142, is fairly new to policy making in the United States. It is nonetheless a style close to the mainstream of American social and political culture which is said to rely more heavily on legal ways of doing things than, say, its closest cultural forebear, England, where paternalism, administrative discretion and a hands off attitude by the government and the courts characterize public policy.[10]

The characteristic features of legalization include a focus on the individual as the bearer of rights, the use of legal concepts and modes of reasoning, and the provision of legal techniques such as written agreements and court-like procedures to enforce and protect rights. This form of policy making borrows its concepts and forms both from public law (for instance, due process) and private law (the written agreement, for example), importing them into the delivery of public services. PL 94-142 comes shot through with legal concepts and procedures: the notion of right or entitlement; the quasi-contractual IEP meeting in which the right is elaborated; the provision of due process guarantees and appeal procedures; and, implicitly, the development of principles through the mechanism of precedent.

A preference for legalization is premised on the

classically liberal belief that individuals, and not the organization charged with delivering a good or service, can best safeguard their own interests. Paradoxically, the very fact that the individual has not been an effective self-guardian is the rationale for offering him or her the resources of the state, thus empowering the individual to pursue this interest. The individuals to be entitled cannot attain the policy goal unaided, either because of ill-will on the part of the service provider, or absence of consensus between them and the service deliverer on the goal to be achieved.

Legalization also betokens a mistrust of other forms of accountability, particularly accountability based on bureaucratic norms of fairness using statistical tests across classes of affected people. Instead it defines accountability in individual terms: a person polices his or her own interests. Individual accountability also implies singling out a party responsible for malfeasance in a way that group compliance procedures do not. Finding that black or Hispanic children are disproportionately represented in special education classes in a school system, for example, does not involve nominating given individuals as responsible for that situation. This anonymity stands in marked contrast to due process procedures based on written agreements, which nominate specific individuals as defendants. In the case of special education these individuals will usually include the special education teacher and the director of special education. This type of

accountability threatens notions of professional expertise and professional discretion. The empowerment of consumers may well alienate key personnel in service delivering organizations such as schools.

The aspirations underlying legalization include a desire for principled decision making, minimization of arbitrariness, and a concern for the rights of the individual. In an extreme case, where an organization is frozen into traditional ways of doing things, legalization as a form of shock treatment may be necessary to bring about a reorientation of goals and priorities. This may entail changes in the power relations between clients and service providers and, as in the case of special education, may involve rearrangement of status positions within the hierarchy of the delivery agency. At the same time the dangers of the approach should not be minimized. One danger, already noted, is that professionals in key positions may be alienated. More generally, legalization may be transformed into a cognate concept, legalism: a narrow approach in which law and procedures become ends in themselves and substantive goals are lost in mechanical adherence to form.[11]

The distinctive features of legalization become clearer if one compares this approach to other characteristic modes of government policy making. Under a professional model a new agency is created to effectuate the policy objective and staffed by professionals in the field of interest who elaborate, administer and enforce the new policy mandate.

The beneficiary occupies a passive role, deferring to the professionals' expertise. This model has been widely prevalent: it is exemplified in the federal vocational education program[12] and - outside education - in the Legal Services Program.[13] This mode of service provision leaves little or no room for the recipient to define the nature and extent of the benefit; that is accomplished in the legislation itself or, more likely in the professional model, by the professionals administering the program. Nor does the recipient have any significant role in maintaining accountability in the system; that function is carried out by units of the bureaucracy, through agency review focusing on regularity of systems and procedures. Such agency review relies on policy impacts on classes of people using probabilistic statistical testing rather than case by case review which can be triggered by an individual. Indeed the very notion of a right is foreign to this approach.

Compared to the legalization model, much more of the responsibility for carrying out the policy in the professional model devolves on experts and the exercise of their discretion. Results rather than principles, discretion rather than rules, and groups rather than individuals are emphasized.[14] The individual has little say in the specification of the benefit and narrower avenues of redress. This is in marked contrast to the legalized model of PL 94-142 which treats the individual as definer and enforcer of the right to a free and appropriate public education.

Programs providing money payments - welfare, social security and the like - constitute a second variant. We term these bureaucratic models since they leave less scope to program administrators than the professional model. Legislation specifies the type of benefit and eligibility criteria and is administered by a government department. The notion of an individual right has more relevance in this model compared to the professional model; greater emphasis is placed on safeguards built into the legislative apparatus. The right, however, is a very limited one in comparison to the legalization model. Unless the claimant can show that the exercise of administrative discretion was either "outrageous or stupid"[15], the best that the claimant can hope for is that the court will ask the agency to review the matter. By contrast, the PL 94-142 framework gives force to an agreement between the parties which defines the substance and extent of the service to be delivered. The due process hearing is not limited to a review of administrative discretion but may rely on the written agreement, the IEP, to provide substance for a ruling on the merits of the case. The existence of a written agreement, possibly some sort of record of the negotiations and the opportunity to pass on the substance of the right make this a much more congenial atmosphere for the legal model, allowing much more scope for the claimant than the narrow review of administrative discretion.[16]

Choice among styles of policy implementation - legal, professional and bureaucratic - has important consequences

in terms of the services provided. It determines the type of service offered, who receives it and on what terms. It limits the degree of variation and affects the stake the client group has in the service offered. It also fixes the extent of regulatory control and the means of redress available to the client group.[17]

Treating a free appropriate public education in terms of legal rights deeply influenced those who drafted the Education for All Handicapped Children Act. Until the 1960s, education was primarily a local responsibility, with federal and state governments contributing funds and technical assistance, not setting detailed standards; increased federal involvement was widely regarded as problematic, even as Washington's role expanded.[18] When special education appeared on the Congressional agenda in the early 1970s, the administration and conservative legislators opposed extensive federal involvement. Yet legalization seemed attractive to those distrustful of local school districts because of their past failures in special education. Political difficulties concerning the traditional and proper role of the federal government in specifying detailed substantive education policy, together with the fact that the accepted pedagogical wisdom that educating the handicapped required individual attention to every case, constricted the options open to Congress. No single policy was either politically feasible or educationally sensible. The alternative was to opt for a

legal-procedural device: a quasi-contractual agreement, the IEP, in which the parties themselves, not Washington, would elaborate the substance of the right defining in individual cases what sound practice dictated. Thus Congress was able to avoid the problem of specifying the substance of this right. In the event of a disagreement over the substance of the right, and to provide a measure of accountability to the federal government, Congress adopted a second law-like procedure: the due process hearing, with a right of appeal.

The incorporation of the IEP and the due process provisions in the Education for All Handicapped Children Act 1975 marks a watershed in the legalization of special education. The approach adopts the courts' characterization of the claims of handicapped children to education as a right, turning it into novel federal policy. The choice of legalization shaped the subsequent history of the policy development. Once the first step toward a legal model had been taken, the policy makers were committed to succeeding steps. Thus, for example, although the due process provisions were substituted for agency review procedures only in the last moments of Congressional consideration, their congruence with the legalized framework established in the early phases made them very attractive and obvious, if not inevitable, choices.

The addition of the due process provisions was a watershed rather than an end point in the legalization process. As PL 94-142 is applied in the school setting its meaning continues to evolve. Legal mechanisms have a life

of their own, especially where the courts step in, and may take forms and directions not anticipated by the policy makers.[19]

With a clearer conception of what legalization entails let us now turn to our case study of special education, and examine the process by which legalization came to dominate this field of policy and the consequences of that outcome.

II EVOLUTION OF A RIGHT

Two million handicapped children aged between 7 and 17 years were not enrolled in school in 1970.[20] Many of these handicapped youngsters were excluded by state laws, like the Pennsylvania statutes attacked in the PARC case,[21] which designated them as ineducable or untrainable. Other handicapped children were consigned to institutions offering only custodial care. By the late 1960s the inhumanity of the treatment meted out to the handicapped at institutions such as Willowbrook and Pennhurst,[22] and the specious nature of the rationale for excluding handicapped children from schools[23] led reformers to demand a radical change in the way handicapped people generally and handicapped children in particular were treated. The means adopted for effecting this change were distinctively legal. The language of rights and the mechanisms of due process were introduced into an area that had previously relied on the professional discretion of teachers, psychologists and school administrators.[24]

A From Proclamations to Courts

The civil rights movement and the War on Poverty provided the key ideas and context for the movement on behalf of handicapped people. Both heavily emphasized legal rights and focused the idealism of a generation of policy makers whose interests brought them in contact with powerless groups. The

emphasis on rights and the active participation of those who had previously been treated as dependents in decisions affecting their lives, as well as more direct analogies from the emphasis on due process in the student rights movement,[25] suggested strategies to activists in the area of special education. The position of the retarded could be and was analogized to that of blacks, Native Americans, and the poor. For many of these groups the courts were the only effective point of entry into the political system. The courts gave power to groups which otherwise had none, and for that reason could not attract the attention of legislatures at state or federal level.

The civil rights movement and especially the War on Poverty generated another key factor in this history: a cohort of young lawyers who, by virtue of the OEO Legal Services Program, were able to find jobs representing poor people in a range of class action suits.[26] By 1969, when the PARC case was brought, the courts were used to such class action suits, there was a body of law concerning the guarantees of the Fourteenth Amendment to which they could refer, and there was a pool of lawyers experienced in poverty and civil rights law practice and strategy.

The way in which a claim is defined, and the orchestration of the campaign to have it ratified are crucial in determining whether it will be recognized at all, and, if recognized, the level at which recognition comes. As noted, the transformation of the political perception about the claims of the handicapped from charity to right began in the 1950s. The formation of associations for retarded citizens at national and state levels

was a most significant step. The most influential of these was the National Association for Retarded children.[27] Key figures in this movement carried out research establishing the educability of all children, and publicized their findings through an extended national network. The associations became active not only on the political level, but also as service deliverers. So, for example, the Pennsylvania Association for Retarded Children (PARC) developed and ran programs for handicapped children funded by state agencies.

The pressure to treat handicapped as persons with rights increased with the creation, in 1961, of the President's Panel on Mental Retardation. The law task force of that Panel enunciated the claims of the retarded to be accorded the same rights enjoyed by other citizens.[28] The use of the language of rights was a significant development and one which was reiterated in a range of forums in the late 1960s.[29] The International League of Societies for the Handicapped and the General Assembly of the United Nations also took up the issue. The U.N. resolution was typical of a number of such declarations:

> The General Assembly...Proclaims this Declaration on the Rights of Mentally Retarded Persons and calls for national and international action to ensure it will be used as a common basis and frame of reference for the protection of these rights:
>
> 1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
>
> 2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential....[30]

Within the field of education, two crucial research

findings were becoming widely accepted in the education community. The determination that all children could benefit from education[31] undermined the rationale for excluding retarded children from public schooling as ineducable. Research also suggested that testing procedures for the assignment of children to classes for the retarded were racially discriminatory,[32] thus strengthening the analogy between the retarded and racial minorities. The issue of educating handicapped children had undoubted appeal. Once one could argue that such children were educable it became well-nigh impossible to mount a politically palatable argument denying handicapped children's claims to education. While educating handicapped youngsters might be expensive, how could costs be weighed against reclaimed lives?

The handicapped rights movement had gained considerable momentum by the late 1960s. Organizations representing the interests of the handicapped had been formed; in state, national and international forums, claims of handicapped youngsters had been pressed as entitlements. While these groups had put considerable pressure on state governments to upgrade facilities and programs for the handicapped, they had been able to extract only expressions of good intent. One such group decided that court action was the only way to break the impasse. One participant in the history summed up the process:

> PARC had been very active in the 50s and 60s. They had devised programs and had them funded, and had legislation passed. They were doing lots of things but they were getting frustrated with other modes, and

> things were not getting done. By the late 60s they had come to see education as a right. They had seen the civil rights movement. They saw the success of the black movement and the poverty law scene in the courts and they decided to take that tack.

The focus of PARC's attention was the Pennhurst State School and Hospital, the subject of considerable press and political attention for inhumane treatment of its patients.[33] PARC had engaged in a long battle with Pennsylvania authorities about the conditions at Pennhurst, but to little avail. The membership of PARC had resisted the idea of bringing litigation, fearing reprisals against patients in the state institutions and against state-funded programs run by PARC. But the failure of quieter strategies, coupled with horror stories about conditions at the institution, led PARC to retain legal counsel.[34]

The influence of legal modes of thought in framing and defining the issues even at this early stage is noteworthy. PARC's attorney, Thomas Gilhool, identified five legal strategies for attacking the Pennhurst situation: individual inmate grievances, misdirection of funds, involuntary servitude, right to treatment, and right to education. He advised that the most promising of the legal approaches was the right to education, a concept that Gilhool asserted had been established in Brown v Board of Education[35]

The legal and factual case that Gilhool mounted was formidable. He was able to assemble a group of witnesses with overwhelming expertise in the field of special education[36] and to forge a link with the Council for Exceptional Children (CEC), a group which had already demonstrated its effectiveness at state

level, and was to become the major federal lobbyist for handicapped children.[37] The plaintiff's monopoly of expertise and weight of evidence swamped the defense. After one day of testimony the Commonwealth withdrew its opposition to the complaint.[38]

The final court order, which was handed down in May 1972,[39] enjoined the defendants from applying statutes excluding mentally retarded children from public education. It required them "to provide...to every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter, access to a free public program of education and training appropriate to his learning capacities."[40]

The order also included a detailed stipulation as to the procedures that had to be followed in classification of mentally retarded children and before changes in their educational status. The provisions run to some three pages in the judgment. They specify a full range of due process procedures, including written notice as to changes in educational status; the opportunity for a due process hearing, at which the parents may be represented by counsel, call and cross-examine witnesses, examine records relating to the child; and a verbatim record of the proceedings.

The consent agreement in PARC was the culmination of the first stage of the legalization of special education. Political pronouncements about the rights of the retarded had been translated into legal arguments and formally recognized in a court of law as protected by the United States Constitution. The federal district court judgment in Mills[41], issued the following

August, reiterated the rights established in PARC and extended them to all handicapped children. There was more to come. PARC and Mills precipitated a rash of litigation across the country, both inspired and orchestrated by lobby groups on behalf of the handicapped, in order to pressure state governments into action. Some thirty-six cases were filed in twenty-one jurisdictions.[42]

The commitment of a policy area to the hands of courts and lawyers has significant policy ramifications. Rights take on a life of their own in the hands of lawyers, who bring a particular conceptual framework to the problems with which they deal. Analogizing the claims of the retarded to the legally cognizable right to education preempts other potential ways of conceiving the issues. To cast a claim in terms of a Fourteenth Amendment right also implies creating a set of procedures to protect that right; in the consent agreement drawn up between the lawyers for the parties in PARC, relied upon in subsequent cases,a detailed set of due process procedures figures prominently. These provisions bear the distinctive marks of the legalized model: an oral, personal public hearing; notice; an impartial hearing officer; representation by counsel; allocation of the burden of proof; access to records; the right to call witnesses and produce evidence; the right to cross-examination; a transcript of proceedings; and, a written decision. Similar provisions were incorporated in the model statute drafted by CEC. Using the decided and pending cases as leverage, lawyers and organizations, such as CEC, were able to lobby for new state legislation. By 1974, twenty-five states required due process procedures.[43]

Bringing suits and lobbying for legislation on a state by state basis is a tedious business especially for organizations with limited resources. The PARC and Mills opinions made the possibility of Congressional intervention more likely - and more attractive.

B From Test Case to Federal Legislation

A range of factors combined to make education for the handicapped an issue ripe for federal legislative action, by the early 1970s. The first developments occurred when administration initiatives[44] and court cases[45] prompted bills to reform school finance in both houses of Congress.[46] The novel prospect of significant federal finance caught the attention of lobbyists for the handicapped.

Publicity about the treatment of the handicapped led to the introduction of bills adding handicap to Title VI of the Civil Rights Act;[47] discrimination against the handicapped in education was specifically mentioned as one reason for the proposed amendment.[48] The emergence of these issues prompted formation of the Senate Sub-Committee on the Handicapped early in 1972. These developments spurred lobby groups for the handicapped to respond; groups which had traditionally focused their efforts at state and local level were drawn into the Washington orbit.

Issues involving the handicapped were thus tentatively placed on the federal agenda. The court cases, however, proved to be the decisive factor. Court orders required the states to provide a free appropriate public education for handicapped children. They had also specified detailed requirements to be met by the states. While several states had developed or were in the process of developing legislation, financial pressure forced the states to turn to Washington for assistance.

The court cases had also convinced policy makers in Washington of the need for federal initiatives. As one policy maker reported: "The court cases, PARC and Mills were

substantial in forming the policy. People thought there would be more cases and that Congress should do something and not just leave it up to the courts". The newly-formed Senate Sub-Committee on the Handicapped decided to take up the issue of special education.

The courts also influenced lobby groups for the handicapped to transfer their efforts on special education to Washington. The CEC, which had played an influential role in orchestrating the litigation and using it to force states to enact special education legislation, had doubts about the constitutional firmness of the court decisions none of which had been tested on appeal. Moreover, diffusing resources across fifty states limited the lobbyists' effectiveness. Their recently acquired experience in Washington over school finance and the Civil Rights Act led them to perceive the advantages of federal legislation. A federal statute would establish an authoritative national standard. While maintaining pressure by continuing to bring cases, the primary focus of the lobby groups for the handicapped changed from seeking substantive change at state level to forcing states to accept - even to promote - federal legislation. The strategy dictated that states be obliged to accept conditions to be imposed in new federal legislation in order to obtain the funds necessary to comply with court orders. CEC, as the leader of a coalition of lobby groups, determined to direct its efforts towards the Senate Sub-Committee on the Handicapped.

The courts were thus a crucial factor in the combination of events which put special education on the federal agenda. The

influence of the courts, however, went beyond this, shaping the substance of policy at federal level.

C The Individual Education Program(IEP)

The approach of the courts to the issue of special education had been to determine that handicapped children have a right to education. Since courts are used to dealing with individuals as bearers of rights, casting the issue in this way made it legally cognizable. Rights can then be protected by due process procedures. As one of our interviewees put it, "You have to go for procedural safeguards rather than substantive things; they're too hard to deal with in litigation. The judges can deal with procedures." This approach also suited the CEC. Compatible with its image as a professional organization and with research findings, it stressed the variability of handicapping conditions, rejected the traditional approach which set standards for general categories of handicap, and emphasized the needs of individuals.

This emphasis on individual needs suited both the professional concerns of the CEC and the processual biases of the legalized model. That congruence in turn predisposed policy makers to continue to deal with further policy questions in a legalized mode. Individualism was critical to the next step in the process of legalization.

The courts had declared the right of handicapped children to a free and appropriate public education, with a presumption that a student be placed in the least restrictive school environment (the environment as similar to the regular classroom as possible). Beyond that, though, the substance of the right was

unspecified. Once the idea of an individual right to an appropriate education was accepted, it became nearly impossible to define the substance of the right to education in general terms, for the needs of individuals varied so greatly from person to person. Moreover, even if a categorical definition could have been produced it would have been politically difficult to do so. Since education was still regarded essentially as a local responsibility, even in this interventionist era, federal substantive mandates would have seemed excessive.

The device settled on to elaborate the right to education, as it appeared in the first Senate bill, was "the individualized written plan" (later to become the individualized education program (IEP)), "a written educational plan for a child developed and agreed upon jointly by the local educational agency, the parents or guardians of the child and the child when appropriate...".[49] The program was to contain a statement of the child's level of educational performance, long-range educational goals, intermediate objectives, the specific services to be provided, the date of commencement and the duration of the services, and objective criteria and evaluation procedures to determine whether the goals were being achieved.[50]

The quasi-contractual nature of this agreement for services is immediately apparent. Although the wording of the act was changed to avoid traditional court ordered contractual remedies, the character of the process is legal, not administrative, in character. Rather than empowering an administrator to exercise discretion in delivering pre-ordained services to a recipient, the act recognizes that the handicapped child has a right. This

right entitles the child or the parents to negotiate as parties with school officials and involves them in the task of defining the nature and extent of the services to be delivered. The character of the IEP is legal and quasi-contractual, a logical extension of the fact that handicapped children had been accorded rights.[51]

The IEP gave detail and substance to the right to free appropriate public education, not by substantive legislative requirements but by a procedure: a mandated meeting in which the parties "develop" the "appropriate" services and reduce the product of the meeting to a written document. This document defines the right to free public education and serves as a standard against which the quality and extent of services provided to the child can be assessed. The IEP is also an ingenious device in terms of political acceptability. It avoids the treacherous waters of mandating specific services; it recognizes the rights of recipients, empowers them, and involves them in the process; it avoids trenching on the professional discretion of teachers and potentially enhances their influence over placement decisions; it provides a means of holding local administrators accountable while paying some deference to the belief that the federal government should not interfere too much with local autonomy in education; and it appeals to local school officials by fixing the upper limit of the liabilities with respect to the child.[52] In sum, the quasi-contractual nature of the IEP accorded with the legalized themes of individualism and rights. At the same time, its contentlessness, in the sense that it prescribed no specific service, made it generally acceptable

to all the interested parties.

D Compliance: Legalization Begets Legalization

If the IEP was to be a meaningful contract, some means of enforcing its provisions, and more generally of assuring compliance with the aims of the law, had to be found. A means for parents to express dissatisfaction with the IEP procedure or the performance of local officials was required, as was an assurance that federal funds were being spent in accordance with the objectives of the legislation.

Early legislative drafts emphasized agency review, a bureaucratic mode of accountabililty. As the legislation took final form, however, due process guarantees and not administrative monitoring became the primary compliance mechanism.[53] This outcome constitutes a further extension of the legalization process, building on the already established themes of individual entitlement and the quasi-contractual IEP. The due process procedures, a natural concomitant of the legalized model, would not only serve as a means of redress for parents but also as a device for monitoring the expenditure of federal funds by local officials.

The history of this aspect of the legislation begins in the 1973 Senate bill[54] with the monstrously impractical notion of forwarding all IEPs to the U.S. Commissioner of Education for review. The idea of detailed central oversight was abandoned when it was realized that the requirement entailed sending some eight million IEP's to Washington each year. The Senate's alternative was a state-level independent complaints agency

called "the entity"[55], which would conduct periodic evaluations of State and local compliance, receive complaints from individuals and provide opportunity for hearings, notify the state or local agency of a violation and take steps to correct it. The entity's ultimate sanction entailed notifying the U.S. Commissioner of Education. The House bill, by contrast, had developed a grievance procedure to be established by the local school district itself which would receive complaints from the handicapped and carry out investigations. There was no provision for a hearing at the local level, although an aggrieved individual could appeal to the state education agency. Neither bill entitled an individual to a hearing.[56]

These approaches are characteristic of administrative review, not legalization. In both bills, the notion of a right was attenuated in favor of efforts at persuasion. Although due process procedures remained in the Senate bill, they were far less detailed than those contained in the PARC consent agreement. In the absence of strong due process protections, the right promised in the IEP appeared far less secure. Yet although the theme of legalization running through the legislation wavered at this point it reasserted itself strongly in the conference committee. The circumstances surrounding the negotiations in conference committee demonstrate the force that legal ideas and forms exercised on the policy makers.

While federal proposals to reform school finance, including provision for federal funding of education for the handicapped, came to nothing, court cases on behalf of handicapped children continued, successfully. Courts ordered the states to provide

expensive services to children. This caused the states to bring intensive pressure on the federal government to provide emergency funding. Some support was forthcoming in the Education Amendments of 1974 (the Stafford Amendments).[57] Lobbyists for the handicapped, however, were determined that the states not receive this money free of strings; they insisted that the amendments include at least attenuated due process provisions lifted from draft bills of what was to become PL 94-142.

The presence of these due process provisions meant that when the conference committee came to debate the competing agency review compliance mechanisms in the House and Senate bills, the House bill in particular was vulnerable to attack. One of our interviewees explained the dynamic by which the due process procedures prevailed. "The due process provisions were adopted in part because the House provisions were so awful. There were due process provisions in the legislation as of 1974 adopted as a result of the Stafford amendments. The House laid grievance procedures on top of these. It confused what had been done with the Stafford amendments. Something had to be done about these [grievance procedures]". Agency review procedures as proposed by both houses of Congress were incompatible with the individualistic nature of entitlement.

Conflict in the conference committee over these competing compliance mechanisms became even more acute when the decision was taken to fund local school districts directly rather than give the states the discretion in distributing the federal money. How was accountability from some 16,000 school districts to be assured? On the one hand there was concern from

congressmen and staffers who had had experience of federal funds being misapplied at local level. They did not want to see "federal money being poured down the same old rat holes" as one policy maker put it, referring to misuse of funds under earlier federal education legislation. On the other hand, the advocacy and civil rights groups did not trust local school administrators and teachers and pushed for due process protections. The Children's Defense Fund (CDF) and the California Rural Legal Assistance Foundation (CRLA) both of which played a key role at this stage as advisors to the congressional conferees, were heavily involved in civil rights and poverty law litigation. Their experience in these fields produced a belief in the efficacy of rights, courts and the court-like procedures, and profound mistrust of bureaucratic accountability. "We felt we couldn't trust the professionals so we wanted a procedure whereby the parents could say, I don't want my child classified as mentally retarded... In the assessment process they [parents] had to participate and if they were dissatisfied there would be procedural safeguards. We knew that was the only way that the power of the school districts could be offset ... We knew that just the presence of such a system [due process] would force the district to play more honestly."

Advocacy groups were also disenchanted with agency review procedures such as those employed by the Office of Civil Rights. As one interviewee said, "we could have had a complaints, civil rights type procedure, and done a study. We didn't want that ... This was based on individuals, not group statistic things."

Quite apart from the inconsistency of agency review with individual entitlement, however, political factors militated against agency review. Any watchdog agency large enough to police 16,000 school districts would have done too much violence to traditions of local governance in education. The due process provisions, however, fitted perfectly into the federal legislative scheme. They carried through the notion of individual entitlement developed in the IEP. They also empowered client and advocacy groups, enabling them to undertake their own enforcement initiatives. Enlightened self-interest would obviate the need for a large watchdog agency and reassure advocacy groups like CDF, which believed that courts and court-like procedures were the only way to counteract the power of local school boards. In addition, the due process provisions were a means of resolving the deadlock between the House and the Senate over compliance mechanisms. "Given the standards, the due process provisions, the procedural protections and the state plan, [it was felt that] the law would be self-enforcing. It was felt that people could enforce from the local level". Finally procedures fitted the legalized model of the legislation: enforcement by parties of rights elaborated in a written document through the due process hearings was an eminently compatible extension of the policy of the legislation.

Although the proposals encountered heated opposition from some of the more conservative policy makers,[58] the due process provisions carried the day. The conferees were offered a solution that both embodied a logically coherent development of all that had gone before and also solved their more pragmatic

political problems. Although the states remained legally obliged to monitor local behavior, the due process procedures assumed primary importance as a means of ensuring compliance and providing a forum for individuals' grievances. Despite a temporary check, the pattern of legalization established in the developomental stages of special education policy reasserted itself in the final moments of the policy making process.

E Substance vs Process

The incorporation of the due process procedures into the federal legislation marks the culmination of the process of legalization. Two aspects of this process are remarkable: its evolutionary nature and the emphasis on process rather than substance.

Although the due process provisions were ultimately included in the legislation as a compromise, they nicely fitted the overall scheme and context of the law. Once the legislators, following the courts, decided to recognize the claims of the handicapped to allow that right to be fleshed out in the quasi-contractual atmosphere of the IEP process, the due process guarantees were a natural complement. Those provisions had tremendous appeal. They recalled the successes of the right to education cases and allowed flexibility on the issue of federal standards, while at the same time reassuring those who mistrusted local officials. Given the course of policy development, the due process provisions were the "right" choice. Once set in motion

legislation assumed logic of its own which powerfully influenced the later policy choices.[59]

What is provided in the Education for All Handicapped Children Act is in large measure procedural. Partly for political reasons owing to the strength of local governance in education, and partly as a matter of conviction about the individual nature of the claims of handicapped children, the right to a free public education is not further specified. Instead PL 94-142 provides one procedure for giving substance to this right, and another for enforcing it. Neither of these defines what appropriate education is, and indeed this may be the attraction of the legal model. Since formulation of the substantive goal was deemed impossible, or not feasible, the procedural solution at least had the virtue of being attainable. Procedure was not, of course, thought to be an end in itself. The aspiration of the drafters of PL 94-142 was that the IEP and the due process procedures would result in a better education for handicapped youngsters. The next section assesses this aspiration in light of the implementation of PL 94-142.

III THE APPROPRIATENESS OF THE LEGALIZED MODEL: THE EMPIRICAL STUDIES

A Introduction

The evolutionary nature of legalization in special education policy precluded any detailed consideration of the appropriateness of a legalized model in the education setting, at least in the policy formulation stage. Faced with the problem of exclusion from school and the experience and frustration of situations like the one at Pennhurst, policy makers considered that they had no alternative to the legalized model. Now that some of the major abuses that led to the court decisions and ultimately the legislation have been abated, questions are being raised about the appropriateness of legalization in the education setting.[60] In particular, some of the early implementation studies of the due process provisions have been highly critical of legalization in the schools context,[61] as have some academic commentators.[62] The legislative agenda of the Reagan Administration seeks to trim back the federal presence, substituting local discretion for federally imposed legalization.[63]

This reappraisal poses serious issues of policy. Does it make sense to impose on education a policy mold which does not place much faith in the professional discretion of the service provider?[64] The implications of this shift are not lost on educators who may understandably resent the implicit loss of

confidence. More generally, does legalization fit the needs and demands of schools?

The imposition of legislative schemes onto ongoing complex organizations, such as schools, creates particular problems.[65] Studies of the implementation history speak less of the promise of legalization and more of its pathology: compliance with the letter rather than the spirit of the law; preparation of standard form IEPs; resentment that handicapped children have gained a priority that does or may gain them more than their fair share of the education dollar; and defensive strategies, such as the tape recording of IEP meetings, to protect the interests of the school district and teachers.

Yet the story is more complex than this. While implementation studies view the due process procedures as a separate and severable part of the federal legislation, these procedures are an integral part of a legislative scheme which adopts a legalized policy style. The appropriateness of this policy style must be judged with reference to the place of special education in the school system, not by focusing only on the due process hearings ignoring this overall context. To be sure, the benefits to special education flowing from the federal presence - more money, more initiatives and the like - must be offset by the costs of the due process hearings. Yet the question is whether these gains could have been achieved without the legalized policy style of PL 94-142.

Legalization was a policy choice, not an inevitability: the British in their deliberations over the reform of special education considered and rejected the legalized style of PL 94-

142 in favor of continued reliance on the judgment of professionals.[66] Context is important here, however, and differences in legal and political cultures between the two countries have brought about differences in the means and styles of policy change.[67] The American emphasis on rights appears foreign to the British who are more prepared to place trust in the benevolence of their officials.[68]

A radical reorientation of priorities in special education was needed in the American context and those who shaped PL 94-142 judged that legalization was the only way to bring it about. That view has much to recommend it. In certain situations shock treatment is called for to convince service deliverers in an ongoing institution that established patterns and values must be changed. Legalization was not the first but the last in a series of approaches taken by educators of the handicapped. Years of campaigning had not convinced the education community of the justice of the claims made on behalf of the handicapped. Legalization was a plausible approach. While law may not be the only way to reorder priorities or legitimate claims - the availability of a great deal of new money for special education or the operation of a competitive market, for example, might have brought about the same result - law and legal sanctions offered a surer and more direct means of institutionalizing the values promoted by the proponents of change. The embodiment of values in law and the possibility of sanctions offer powerful reference points to those implementing a reform, serving as a rallying point for claims on the system and a powerful mechanism for responding to arguments from competing value positions. The law

also provides a frame in which values can be translated into services and new values and services can emerge, for it requires the adjustment of power positions of the various groups within a system. Proponents of the new values gain power in the institution and can introduce still further changes on behalf of their interests.

In short, legalization is neither so cost-free as its proponents suggested nor so defective as subsequent analyses contend. In what follows we explore the effects of legalization by examining the implementation of PL 94-142 and the due process mechanisms in particular. We go beyond this, however to examine the effects of legalization on the school system qua system. It is in this broader frame that we ultimately assess the appropriateness of the legalized model. Our verdict is mixed. The radical intervention of the legalized policy style of PL 94-142 was necessary to give effect to and legitimate the educational claims of the handicapped. But the legalized model could be modified to avoid some of its detrimental effects, including a potential for distorting the allocation of education resources.

B Implementation: The Due Process Procedures

The studies of the implementation of the due process aspects of PL 94-142 are the best available indicators of the effects of legalization but they need to be evaluated with caution.[69] For one thing, they report a fairly short experience of the legislation and necessarily do not deal with the possibility that

implementation improves over time.[70] For another, they are flawed in a variety of ways. The research typically relies on small, non-random samples of individuals involved in the hearings. While valid as a guide to the experience of those who undertake a hearing, these cases focus on the pathologies of the process. They do not speak to the appropriateness of the due process procedures generally, nor to the level of satisfaction in general of parents of handicapped children with the new law. This research approach shortchanges the systemic effect of the procedural reforms. Moreover, since the studies only report the post-legislation experience, the ill-effects attributed to the due process procedures may simply be old problems transferred from other forums or made more visible by the existence of the hearings.

(i) The IEP Meeting

The notification and procedures required to draw up the IEP and hold the meeting are generally in place.[71] After some early hearings where schools failed to comply with notice deadlines, and the like, the mechanics of the IEP procedure seem to be operating.

Qualitatively, the picture is not as clear. Two types of IEP meeting have been identified: a legalistic form in which half the time is devoted to narrow procedural requirements, and a child-oriented form, faithful to the spirit of the Law.[72] IEP meetings in which the parents are overwhelmed with professional jargon and other strategies used by schools to minimize the

portion of their resources devoted to meetings have been reported in two states.[73] There are also hearsay accounts of IEP's prepared in advance where the parent is pressured to sign on the dotted line, but little evidence to indicate how widespread this practice is.

Reactions to the IEP process are mixed. Parents generally seem satisfied, even enthusiastic, about the development of the IEP, but in the districts characterized as legalistic, one third of the parents describe the meetings as formalistic.[74] Teachers generally regard the IEP as useful but reports differ as to whether there is a high degreee of actual use of the IEP as an instructional tool,[75] or such use is the exception rather than the rule.[76] Even this more pessimistic accounting acknowledges that the IEP has the force of law and serves as new found leverage both within the school and the district and provides a basis for a due process hearing.[77]

(2) Due Process Hearings

(a) Number of Hearings

The total number of due process hearings held pursuant to the Education for All Handicapped Children Act is not known. Hearsay reports from our interviewees suggest wide variations from state to state. In California, 278 hearings were held in 1978-9, the first year of uniform state regulations, and one-third of these were held in two school districts. That number represents just .08% of California's special education

population.[78] A nationwide study of twenty-two sites found half had experienced hearings; seven had only one hearing.[79] Massachussetts had 350 hearings between 1974 and 1979.[80]

As with litigation generally, it is difficult to say whether those figures represent a large percentage of hearings relative to the total population or to the number of people who had grievances. By way of a couple of rough comparisons we know that 1.2% of consumers who had complaints actually took them to a third party.[81] Regulatory agencies like the SEC conducted formal hearings in .005% of matters submitted to it; the FCC's ratio of hearings to licensed transmitters was .001% and the Immigration Service had .02% hearings on 700,000 applications.[82] In welfare hearings the appeal rate is 2%.[83] These figures suggest that hearings are highly unusual phenomena in relation to the number of people or even the number of complaints in a given area. The number of special education hearings looks roughly comparable to hearings held in other contexts. In terms of absolute numbers of hearings per school district, the vast majority of school districts do not have a great burden of hearings, although the costs falling on some districts experiencing frequent hearings are high, and, as detailed below, the financial and emotional costs of these hearings on individual parents are also substantial.

The impact of hearings, however, cannot be measured simply in terms of the number of hearings held.[84] The prospect of a hearing and estimations of its likely outcome shape the behavior of participants both in the formulation of their basic relationships and in the way they handle their disputes. The

"shadow of the law"[85] extends well beyond the formally affected parties.

(b) Who Uses the Hearings and For What?

Middle class parents bring the majority of hearings[86] - the proportion of middle class users was as high as 82% in one study[87] - leading one commentator to observe that "[d]ue process and appeal procedures are used to advantage by the well-to-do and almost not at all by the poor."[88]

That the middle class are better able to press their claims is well-known, hence not surprising in this context. Factors similar to those identified in other contexts seem to be at work in relation to the use of hearings in the special education context. People in ongoing relationships are unlikely to resort to legal sanctions.[89] Parents who know that their children will have to deal with the local school district personnel for twelve years are understandably reluctant to resort to legal action, with the anxieties that such undertakings generate, in all but the most serious cases. The opportunities for reprisal even after an outcome favorable to the parents, and the difficulties of enforcing such a decision in the face of an intransigent school district,[90] pose too great a risk.

Middle and upper class parents do not face such high odds, for they have an exit strategy.[91] Their complaints typically assert the inability of the local school district to provide "appropriate" education and claim reimbursement for tuition in

private schools. If this proves unsuccessful, these parents can pay for the private schooling themselves. Lower class parents do not have this option; when they are involved in hearings at all, it is most often to resist changes proposed by the school, rather than to initiate change.[92] The ongoing nature of their relationship with the school system means that circumspection is probably in the best interests of these parents. This pattern points up an important limitation on the capacity of due process to bring about change in professionally run bureaucracies. It also raises questions about the wisdom of placing primary reliance on due process to effect policy change.

(c) Style of Hearings

Adversariness and legalism seem to characterize the conduct of hearings.[93] Rather than the informal negotiating format envisaged by some of the policy makers we interviewed, the due process hearings tend to provide a forum for culmination of long term bad relations between the school and the parents involved.[94] Involving lawyers aggravates the situation, rendering proceedings more legalistic.[95] Emphasis on compliance with procedural matters such as notices, signatures and time deadlines offers an easy substitute for harder substantive questions such as the meaning to be given to the word "appropriate" in the phrase "free, appropriate, public education" in a given case. This legalistic pattern seems particularly evident in the earlier stages of implementation. As schools have

learned to comply with the forms of the law opportunities for evasion have diminished, and there is some evidence of reduced formalism, as in reliance on "pre-hearing hearings" and negotiations among the participants.[96]

Parents generally reported both considerable expense and psychological cost in the hearing process. They often felt themselves blamed either for being bad parents or for being troublemakers. Many perceived the school district officials to be lying:

> I've been through seizures and everything else with her, and this has been the worst affair of my life.
>
> It's been hell. Absolute hell. I seldom speak about it, even to my husband because I find that it gets me extremely upset.
>
> My hands right now are shaking as I am talking to you about it. I'm cold and I get that same horrible feeling all over ... [B]ut I feel that its very hard to sit across from someone 2 or 3 feet away and have them lie blatantly and not be able to say anything about it.[97]

School districts regarded the hearings as expensive, time consuming and a threat to their professional judgment and skill. The private school placements which parents often sought are enormously costly and also carry an implied criticism of the public school program. Directors of special education programs often regarded parents seeking these placements as "ripping off" the school system, depriving other children of the benefits that would otherwise accrue to the public school program.[98] They complained about inconsistency in interpreting the appropriateness criterion from one hearing to the next and difficulties in accounting to the school board for expensive new

services endorsed in hearings.[99] Special education administrators see themselves as caught in a cross-fire between parents and hearings officers who charge them with denying entitlements and school boards who blame them for failing to hold the line on expensive new services.

Some school districts which have experienced a number of hearings have developed an array of defensive strategies. There are reports of districts tape-recording IEP meetings, retaining lawyers, tightening up on procedures[100] and interpreting education and related services narrowly; all ways of sticking to the letter of the law.[101] Other districts negotiated extra services with parents who promised not to pursue a hearing, or threatened to demand a hearing in order to coerce parents into accepting an IEP.[102]

While a few participants in due process hearings regarded them as positive experiences, allowing some sort of catharsis and a forum in which an independent party could suggest a solution,[103] most held a negative view. In many instances, hearings have become an additional weapon with which the disputants can bludgeon one another. Parents see themselves as pursuing the best interests of their child while the school district is anxious to preserve limited resources.

The negative effects of the due process hearings should not be exaggerated. Even though they impose a high economic and psychological cost on all involved, their incidence is concentrated on relatively few school districts. Furthermore, these are districts where parents have a long history of dissatisfaction with the school system.[104] The hearings provide

an arena in which old conflicts are played out, and sometimes escalated. In view of this the assertion that the introduction of due process procedures has caused relations between schools and parents to deteriorate must be treated with extreme caution.

IV THE APPROPRIATENESS OF THE LEGALIZATION MODEL: THE WIDER CONTEXT

A Introduction

The implementation studies discussed in Section III assess the appropriateness of legalization in special education without either attending to the wider context of the education system or proposing plausible alternative means of rectifying the indisputable abuses of the past. To focus on the due process procedures in isolation and to identify the undesirable effects associated with them is to miss the broader institutional changes associated with the legislation, of which the due process procedures form an integral component.

Passage of PL 94-142 has had an enormous effect on special education. More than 230,000 children were identified and provided with education within the first two years after passage of the law and the rate of increase is steady.[105] Although appropriations are now falling below authorizations, there has been an infusion of $950 million in federal funds over the first two years of the program, increasing to over $800 million in each of 1980 and 1981.[106] Although reduced substantially under the Reagan Administration, special education has proved to be less of a casualty than other social welfare programs.[107] This represents an enormous increase in special education expenditure which has produced not only cash benefits, but also augmented the prestige and attractiveness of special education as a field of

endeavor. The formal procedures mandated by the Education for All Handicapped Children Act are in place and many new programs are being developed in school districts.

Much of this change might have been achieved without reliance on such a legalized policy style. Implicit in the criticisms of due process procedures is the suggestion that the policy makers were wrong in believing that the legalized model was essential to achieve their purposes, and that legalization is inappropriate in the context of education. Even if we remain skeptical about the causal links between the due process hearings and the effects attributed to them by the studies canvassed in Part III, there is reason enough to raise concerns about the appropriateness of the due process procedures in the school setting.[108] It may be that some issues are not amenable to legalized treatment[109] and that education is one of these, but in our view that will depend on analysis of the particular situation. In the context of special education, it involves studying the effects of legalization going beyond mere consideration of the hearings process to look at the impact of legalization on the wider institutional setting.

B Legalization and De-Legalization

Legalization, a relatively new phenomenon in the schools context,[110] is more familiar in public life generally, where trends alternate between reliance on formal, procedural justice

on the one hand and informal, substantive justice on the other.[111] The civil rights era and the War on Poverty heavily emphasized rights, lawyers, courts and formal procedures.[112] Those who studied those movements in the late 1960s and early 1970s began to doubt the extent to which substantive goals could be achieved through the legal model, especially where the poor were the intended beneficiaries.[113] The mid 1970s, by contrast, saw the rise of an interest in delegalization, emphasizing informal methods of dispute resolution, arbitration, mediation, negotiation, ombudsmen and community dispute resolution centers.[114]

Underlying this dynamic is the Janus-faced nature of legalization. In its positive aspect, legalization makes several promises. It is a vehicle by which individual citizens may redress the balance between themselves and the state or other powerful opposing interests. It provides access to individuals unable to summon the political resources needed to obtain a legislative majority in modern politics. It offers principled decision-making in an impartial, procedurally balanced forum. It emphasizes accountability, administrative regularity and the reduction of arbitrariness.[115] In its other face, legalization can turn into legalism, arid formality.[116] Equality before the law is too often dependent on access to resources. It can also lead to the sorts of pathologies - defensiveness, delay, hostility, expense - adverted to in Part III. Emphasis on accountability and reduction of arbitrariness imply a mistrust of those administering policy; that in turn may inhibit the creative exercise of professional discretion and judgment.

This duality of the legal model plays itself out in the special education area. Previously, handicapped children were excluded from school and from their share of the education dollar; those given some instruction were often badly treated by the education system. After years of unsuccessful political efforts, the courts were called on to restructure power relationships in the education organization that excluded the handicapped, and to legitimate their claims by declaring that they had a right to a free and appropriate public education. The embodiment of this value in the law meant that handicapped children could no longer be excluded from school and that their claims to education were legitimated. Arguments to the contrary were nullified. Legal sanctions were now available to enforce the right. The argument has now moved on beyond the question of admission to the question of the quality of education to which the handicapped are entitled.

Questions of quality and the appropriate education are controversial in two respects. First, the meaning of an appropriate education is perenially controversial. Leaving the criteria unspecified may have been politically expedient for Congress but its specific content must be determined at some point in the process. To a great extent these criteria will be elaborated through the hearing and review process, as the parties make their arguments over the content of an appropriate education for handicapped children.

Leaving substantive determinations to hearing officers has both the virtues and the vices of legalization. It contemplates principled arguments about the amount and type of services due to

a given child. The scope for principled argument may in itself be seen as a good, compared to such alternatives as centralized bureaucratic decision-making with its attendant problems of distance and rigid categorizations or professional judgments which are often paternalistic and give undue weight to the needs of the professionals at the expense of the handicapped student.

The legalized model also creates problems.[117] Handicapped children are accorded formal rights not made available to other children in the education system. There is, for instance, a tendency for rights to know no dollar limitations.[118] Yet the reality that school administrators face is that they have limited budgets and must make difficult decisions about the just distribution of those funds among competing sectors of the school system. The effect of PL 94-142 is to segment that decision-making power, empowering hearing officers from outside the school administration to make decisions about potentially large slices of the school's budget. It is not clear whether the hearing officer is supposed to take into account the budgetary realities of the school system as a whole, of the special education segment of that system, or just to consider the educational merits of the program proposed for a particular child.

Second, ambiguity surrounding the word "appropriate" produces tension between schools and parents.[119] School officials complain about parents looting the public treasury to obtain private school placements and express frustration that they feel unable to put these sorts of arguments to the hearings officers. This limitation may be attributable to the tendency of due process hearings to individualize problems but it is not a

necessary interpretation of the legislation. Acting on this perception, school administrators are resorting to indirect means of protecting funds, adopting defensive or delaying tactics, and attempting to translate arguments based on the needs of the school system in general into arguments about a particular child. For their part, parents' expectations may have been raised to unreal levels by the law. Their concern is likely to reside exclusively with their child; in their eyes the word "appropriate" may have come to mean whatever is appropriate regardless of the cost. This would explain parental frustration with school districts, and their perception concerning the lack of candor in the school officials with whom they deal.

While this dispute over the relevance of costs is partly attributable to the fact that entitlements of handicapped children, but not those of non-handicapped children, are clearly spelled out, it is also partly a function of the adjudicative process itself. The hearings mechanism is, in its ideal form, a case-by-case process; it formally assumes that two parties are disputing in a contextual vacuum. That fiction alone is enough to give rise to considerable frustrations. Moreover, different hearing officers will render different decisions on similar cases. There is no consistent interpretation of "appropriate", and there does not appear to be much communication between hearing officers about their decisions.[120] While this may change as precedents are developed, several factors - the variegated nature of appropriateness, coupled with the fact that hearings officers lack either the legal or educational expertise to render consistent judgements and the variability of schools and

handicapping conditions - makes consistency unlikely.

Modest changes in the law would improve the situation. For one, the legislation should be amended to make it clear that arguments based on the overall needs of the school system (subject to proof and open to challenge in the hearing) are germane to the question of appropriateness.[121] Use of informal dispute resolution techniques seems to be producing good results, and should be encouraged.[122] Greater information, attention to problems at an early stage of development and the use of mediation techniques prevent the escalation of conflict in a significant number of cases.[123]

The broadest concerns relate to the effects of legalization of special education on the school as a bureaucratic/professional organization.[124] Schools are networks of relationships. They face serious problems of coordination, confronting acutely complex questions of distibutive justice among different elements of their program, of management vis a vis their own professional staff, and of accountability to the community, especially to the parents of currently enrolled students. The meaning of a good education is controversial, and limited in any case by funding realities. Potential lines of conflict run in every direction: between school board and principal, school board and teachers, teachers and principal, teacher and student, and teacher and parents.

The effect of legalization on special education entails a radical reorientation of this complex network. On the positive side, it empowers what was previously an out group. The handicapped must now be included in policy decisions. No one in

the school system can maintain any longer that handicapped children should be excluded from school, at least not publicly. Admittedly there may be covert attempts to exclude the handicapped but this very covertness to a significant degree deprives such arguments of much of their force. The force of the state and the moral authority of the law is available to the handicapped. In arguments over services and resources the claimants can point to their legal entitlement to rebut the arguments of their opponents. The IEP has the force of law and parents and special education teachers can use this to press their claims on behalf of handicapped children. Parents of the handicapped can also look to the law as defining their entitlement rather than being obliged to appeal, forlornly as was formerly the case, to the generosity of the school system. In short, PL 94-142 effects a shift in bargaining power, and prevents the claims of the handicapped from being fobbed off. As has been said in the context of anti-discrimination laws: "We like to use reason, not force. It isn't right to talk reason out of one side of your mouth and law out of the other, but before the law was passed they weren't as willing to listen to reason".[125]

Legalization has also changed the status of the special education professional. In an era of shrinking education budgets, special education has received an infusion of new money. It has become an attractive area for new teachers and a way for existing teachers to earn additional salary and avoid retrenchment. Special education teachers are assuming places in school administrations which, hitherto, they had not held, and

this too will affect the organizational goals of schools and strengthen the perceived legitimacy of the claims of the handicapped.

Against these gains, the pathologies of legalization must be owned. There is some evidence that the values promoted by the legislation are provoking reactions from the education community. Increasingly there are assertions that "These handicapped kids are getting to much", "We're swamped with paper work", "All kids deserve individual treatment" and the like. The evidence of defensive strategies is also disquieting.

Neither of these developments is surprising. Despite increased funding there are too few resources to treat all handicapped children individually.[126] By distinguishing the handicapped children from the regular school network and granting them rights not enjoyed by other school children, Congress has set up a potential for distortion in the allocation of resources. This potential is aggravated by the legal model which treats the parties to a dispute as discrete from the system in which they are located.

Finally, legalization betrays a mistrust of schools. It may inhibit the discretion of professionals[127] whose judgment should be exercised creatively on behalf of the child.[128] In the past that distrust may have been richly deserved. But legalization can be a blunt instrument, undermining healthy as well as malevolent exercise of discretion. Special education teachers now find themselves as "defendants" in due process hearings. This represents a marked change from their self-perception, prior to passage of PL 94-142 as lone advocates for

the handicapped child. From the viewpoint of the handicapped it would be disastrous to alienate this group, particularly in view of their role as primary service providers and their new status in the school hierarchy. Encouraging mediation and negotiation, rather than due process hearings, should diminish this danger. Moreover, resolution of the appropriateness issue should release special educators from the somewhat false position in which they now find themselves covertly having to argue on behalf of the needs of the school system. Once recognized as legitmate, the system's needs could be advanced openly by representatives of the wider interests leaving special educators to put the case for their component of the system. Parents would not maintain unreal expectations. In this way, parents and teachers could be reunited in the task of providing the best education, within budget constraints, for handicapped children.

Finally, the utility of the due process hearing as a compliance device is dubious. Individualization, lack of coordination and the settlement of strategic cases to avoid hearings suggest systemic problems which may be missed by the individualized nature of the hearings. Hearings alone are ill-suited for the task of precipiating systemic review and reform.[129] Agency-wide review, law reform litigation and political change remain key parts of appraising and modifying any program.

Only in the context of those wider considerations may the appropriateness of legalization be assessed. Legalization was appropriate and necessary to jolt the education system into according handicapped children a fair share of the education

pie. The shortcomings of uncritical reliance on legalization were foreseeable, even though they were probably not foreseen by the policy makers. As the system comes to accept the presence of handicapped children and recognizes the legitimacy of their claims and as special education teachers acquire new status in school hierarchies, there are sound reasons to diminish reliance on some aspects of the legalized structure of special education.

SECTION V

CONCLUSION

The American legal and political culture has historically emphasized rights and individualism. During the 1960s civil rights era, the Supreme Court heightened this emphasis by constructing a legal charter for minority groups out of the Fourteenth Amendment. The intellectual currents arising out of that era dominated the political culture until quite recently. Claims on the political system were expressed in the language of rights; the courts, rather than legislatures, served as the chief forum for the disenfranchised. Rights and the due process of law became the political manifesto of blacks, native Americans and the poor. Public interest law, class action litigation and the Legal Services Program were, in their various ways, manifestations of the importance of legal modes of action during this period, and the activity in the courts forced legislatures into new policy areas.

The legalization of special education is but one instance -albeit a particularly interesting one-of the dominance of legal ideas in the formation of public policy at the time. Not only did the astute use of courts produce pressure for legislative action on education for the handicapped, but the influence of legal ideas also fundamentally shaped the policy developed in the legislative setting. The legalization of this area of policy marked a radical departure from traditional professional and bureaucratic modes of delivering government services. Its

primary reliance on legal concepts and procedures to achieve its objectives make the Education for All Handicapped Children Act a singular example of legalization as a policy-making style.

The continued prominence of legalization as a policy making style seems less likely. The force of the civil rights era which gave so much impetus to the development of the special education policy, is spent. The rhetoric of rights has waned as calls for smaller government, lower taxes and budget cuts produce a climate skeptical of new claims on the public sector and doubtful about many of the old ones. It may well turn out that many of these rights turn out to have clay feet as the tide of budget cuts, legislative repeal and circumspection in the courts sees some rights disappear. The Supreme Court decision in the Pennhurst case,[130] narrowly construing the statutory requirement of a "minimally adequate habitation" in "the least restrictive environment", presages a less interventionist role for the courts. Budget cuts may also force people with opposing rights into conflict with one another in zero sum encounters. All of this will serve to diminish the "trump card" quality of rights and force lobbyists on to other strategies for achieving their objectives.

This is not to suggest, however, that legalization will disappear from public life, for the values it symbolizes are too deeply embedded in the political culture. The federal treatment of special education was a high water mark in the development of legalization and the resultant legislation established new methods of government service delivery. The lessons to be learned speak to individuals' rights to enjoy essential public

services and to participate in decisions affecting delivery of those services. Those values remain fundamental in American public life. Yet there are also lessons to be learned about the complex nature of organizations and the balancing of all interests within those organizations. Legalization is a powerful tool which needs to be understood and used sensitively. In the long run, there can be no easy solution to the difficult questions of distribution in organizations with conflicting interests competing for limited funds. Outright exclusion such as handicapped children suffered is no answer; neither is the enfranchisement of one group with little effort to relate that group's needs to those of other claimants. Those who would undertake the legalization of a policy area must take careful account of the context into which the policy is introduced for only in this way can the appropriateness of legalization be weighed against alternative policy courses.

FOOTNOTES

1. See, for a discussion of these policy frameworks, Kirp, "Professionalization as a Policy Choice: British Special Education in Comparative Perspective", 34 World Politics 137 (1982).

2. P. Selznick, Law Society and Industrial Justice (1969).

3. R. Kagan, Regulatory Justice (1978).

4. D. Kirp, "Proceduralism and Bureaucracy: Due Process in the School Setting" 28 Stan. L.Rev. 841 (1976);

5. L. Mayhew, Law and Equal Opportunity (1968).

6. See Abel, "Delegalization: A Critical Review of Its Ideology, Manifestations and Social Consequences", in E. Blankenburg, E. Klausa and H. Rottleuthner (eds), Alternativem zum Recht: Jahrbuch fur Rechtssoziologie und Rechtstheorie, band 6. (Opladen: Westdeutscher Verlag, 1979), 29.

7. 20 U.S.C. §1401.

8. By contrast Kagan, supra Note 3, Mayhew, supra Note 5 and Selznick, supra Note 2, focus on the appearance of legalization as a response to an organization's own

perceived needs.

9. There is a sense in which any time Congress makes a law about anything one can say that the policy area has been "legalized", i.e. a law about it has been enacted. That is not the sense we intend to convey here. Rather we attempt to identify and characterize a particular method or style of policy making and distinguish it from other ways of achieving policy objectives.

10. See generally Kirp, "Professionalism as a Policy Choice", supra Note 1 and D. Kirp, Doing Good by Doing Little (1979). For a comparison of United States and English attitudes to the role of law in making public policy see D. Horowitz, The Courts and Social Policy Ch.1 (1977).

11. Selzick described the problem of legalism in this way, supra Note 2,at 13:

> But legal correctness has its own costs. Like any other technology, it is vulnerable to the divorce of means and ends. When this occurs, legality degenerates into legalism. Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of the legal process.

Distinguish this usage of legalism from that of Judith Skhlar who means something synonymous with the rule of law. Legalism (Cambrige, Harv. U.P.: 1964). A number of

the points about the assumptions of and motivations behind legalization are drawn from a talk given by Philip Selznick to the Berkeley/Stanford Joint Faculty Seminar on Law, Governance and Education, October 1980.

12. We are indebted to Martin Shapiro for this example. For a history of federal vocational education policy see: C. Benson, "Centralization and Legalization in Vocational Education: Limits and Possibilities" (Unpublished paper, 1980.)

13. See J. Handler, E. Hollingworth and H. Erlanger, Lawyers and the Pursuit of Legal Rights 29-39 (1978).

14. On the distinction between judicial and administrative exercise of discretion see Philip Selznick, supra Note 2, 14-17 and R. Unger, Law in Modern Society 176-9 (1976).

15. On this and other problems of welfare beneficiaries in suing government officials see Handler, "Controlling Official Behaviour in Welfare Administration", in J. ten Broek (ed), The Law of the Poor 155, 160-1, 170-176 (1966).

16. Ibid.

17. Kirp, supra Note 1,at 138-9.

18. See generally D. Kirp and M. Yudof, Education Policy and Law Ch.7 (1982).

19. For example, see the studies by Kagan, supra, Note 3 and Selznick, supra Note 2.

20. Children's Defense Fund, Children Out of School (1974). Other sources state that there were some 7 million handicapped children of whom only 40 percent were receiving an adequate education. See: 3 U.S. Cong. and Admin. News, 93rd Congress, 2 Sess. 1974, 4138

21. Pennsylvania Association for Retarded Children, v Commonwealth of Pennsylvania 343 F. Supp. 279 (E.D.Pa 1972).

22. The Pennhurst State School and Hospital, the object of the PARC litigation, enjoyed some notoriety for overcrowding, lack of staff, and inadequate treatment. One commentator described it as "A Dachau without ovens." See L. Lippman and I. Goldberg, The Right to Education Ch.4 (1973). Pennhurst was not an isolated example. See M. Herr, "Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded" 23 Syracuse Law Review 995 (1972), and B. Blatt and F. Kaplan, Christmas in Purgatory (1966).

23. The evidence of the experts brought to testify in the PARC

case on the educability of the handicapped was so overwhelming that after one day of testimony the defendants conceded that all children could benefit from education. Lippman and Goldberg, ibid., 29.

24. On the use of rights as a political resource, see Stuart Scheingold, The Politics of Rights : Lawyers, Public Policy and Political Change (1974). As Scheingold notes, ibid. at 8-9:

> The politics of rights focuses on distinctive forms of political action which are closely associated with lawyers and litigation. Attention is directed to the articulation of public policy goals by courts and to the post-judgment political process... In the final analysis success may well turn on how skilfully litigation is employed and especially how well it is coordinated with other tactics.

His observations have particular relevance to the argument we develop about the way in which lobbyists in special education used the rhetoric of rights and the court decisions to further their political objectives, though whether the use of these resources was purely instrumental, or whether there was a sort of symbiotic exchange as lobbyists and events changed in response to one another, we regard as an open question. So, for example, while lobbyists may have commenced court actions, they probably did not foresee all their consequences, particularly the consequence of the states turning to the

federal government for financial assistance. When this did happen, however, lobbyists responded flexibly and made quick and skilful use of the opportunities presented at federal level.

25. See Goss v Lopez 419 U.S. 565, 576 n.8 (1975). See generally Kirp, supra Note 4.

26. For a history of the development of this program and an argument about the importance of the organizational framework it established, see Handler, Hollingsworth and Erlanger, supra Note 13, at 17-47.

27. Lippman and Goldberg, supra Note 21,at 20.

28. President's Panel on Mental Retardation, Report of the Task Force on Law (1963).

29. Lippman and Goldberg, supra Note 22, at 1, 7-9, and Herr, supra Note 22.

30. G.A. Res, 2856 (xxxvi Session) adopted Dec. 20, 1971.

31. Lippman and Goldberg, supra Note 27, at 29.

32. Ibid. at 8-9 See also Diana v. State of New York 70 Misc 2d 660; 335 NYS 3.

33. Lippman and Goldberg, supra, Note 21,at 8-9.

34. Interview with Jim Wilson, president of PARC at the time of these events, September 1980.

35. "In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms". 347 U.S. 483, 493 (1954).

36. They are listed in Lippman and Goldberg, supra Note 21,at 28-29.

37. The CEC is a national professional organization with 90% of its membership composed of special education teachers. Unlike teacher unions it has no responsibility to its membership for wages and conditions. Its purpose is to develop policy in the field of special education. This policy is formulated very broadly by a national convention which enunciated a statement of handicapped children's rights in 1969 and had drafted a model statute for state legislatures.

38. Lippman and Goldberg, supra, Note 21,at 29.

39. 343 F. Supp. 279, 302.

40. Ibid.

41. Mills v Board of Education of the District of Columbia 348 F. Supp. 866 (D.D.C. 1972).

42. R. Martin, Educating Handicapped Children: The Legal Mandate (n.d.) 15.

43. Abeson, Bolick and Hass, "Due Process of Law: Background and Intent" in F. Weintraub et.al. (eds.), Public Policy and the Education of Exceptional Children 30 (1976).

44. President Nixon had proposals on equalization of school finance before the Congress.

45. Serrano v Priest 5 C 3d 584, 487 P2d 1241, 96 Cal Rptr. 601 (1971)

46. Reischauer and Hartman, Reforming School Finance 149-69 (1973)

47. The House Bill was introduced by Congressman Charles Vanik of Ohio on 9 December, 1971 (117 Cong. Rec. 45974-5) and Senator Hubert Humphrey introduced similar bill into the Senate on 20 January, 1972 (118 Cong. Rec. 106-07). These later became §504 of the Rehabilitation Act, PL 93-112.

48. Martin, supra Note 4, 16-17.

49. Sec. 3(9). The teacher was added by the 1975 bill.

50. Ibid

51. The term quasi-contractual is used advisedly. The National School Boards Association was at pains to ensure that the IEP not be seen as a contract from which specific performance and other court remedies would flow. CEC agreed to this. House Select Education Subcommittee Hearings, 10 April, 1975, 76. The Senate Labor and Education Committee expressed a similar concern Senate Report (Labor and Public Welfare Committee) No. 94-168, 2 June, 1975, 11. One of the first expressions of the idea of a contract was in Gallagher, "The Special Education Contract for Wildly Handicapped Children" 38 Exceptional Children 527 (1972). As one of the policy makers we interviewed summed it up:

> We intended to strengthen the hands of parents ... It was a way of individualizing and contractualizing the relationships and involving parents in the process ... Its a way of enforcing what should be delivered to kids. While its said not to be a contract, it is a contract for service delivery".

Note in passing the commitment to the involvement and empowerment of the recipient. The interviewee made the attribution to the 1960s and the War on Poverty explicitly later in the interview.

52. One of our respondents informed us that this last item was a good selling point for the IEP to local boards.

53. The first bill proposed in January, 1973 contained a number of due process measures which looked almost identical to those contained in the PARC consent agreement. That bill did not, however, contain the full range of due process provisions ordered by the court in PARC. From our interviews it seems that there was little discussion of the due process procedures until the conference committee stage when there was heated debate under the pressure of the need to secure a compromise between the House and Senate bills. These bills contained agency review type bodies, called "the entity" in the Senate bill, while the House bill included a set of "grievance procedures". These were at odds with one another and with the legalized concepts already implanted in the early drafts. We take this up below.

54. S.6, 57a

55. S.6, §614(8).

56. H.R. 7217, §617.

57. 20 U.S.C. §614; PL 93-380.

58. One congressional staff person is reported to have stormed out of the meeting accusing the proponents of the due process provisions of "carpet bagging".

59. The power of legal ideas has been noted in other contexts. e.g. Kagan, supra Note 3, and Selznick, supra Note 2.

60. Pittenger and Kuriloff, "Educating the Handicapped: Reforming a Radical Law" 66 Public Interest 72(Winter, 1982).

61. C. Hassell, A Study of the Consequences of Excessive Legal Intervention on the Local Implementation of PL 94-142 (Ph.D. Thesis, University of California, Berkeley and San Francisco State University, 1981).

62. Atkin, "The Government in the Classroom", 109:3 Daedalus 85 (1980).

63. See, for example, Kirp, "Education: Can the Democrats Offer Equity and Excellence Too?" New Republic, April 21, 1982.

64. Of course professionals are coming under a great deal of fire in a number of fields. I. Illich Tools for Conviviality (1973), speaks about professions generally; E. Goffman, Asylums (1961) takes up the argument in relation to the medical profession. Wasserstrom, "Lawyers as Professionals: Some Moral Issues" 5 Human Rights 1 (1975) considers them in relation to the legal profession.

65. Mayhew, supra Note 5,at 1-30, esp. 23, and 258-284. On implementation in special education see R. Weatherley, Reforming Special Education: Policy Implementation from State Level to Street Level (1979) and on implementation generally, see E. Bardach, The Implementation Game (1977).

66. United Kingdom, Committee of Enquiry into the Education of Handicapped Children and Young People (London, Her Majesty's Stationery Office: 1978) and see Kirp, "Professionalization as a Policy Choice", supra, Note 1. According to Kirp, the Warnock Committee Report even if implemented would not have caused significant changes in the way handicapped children are treated by the education system. On the other hand, we will argue that PL 94-142 has brought about a quite radical change in the way handicapped children are treated in the American education system, most notably that large numbers of them are no longer excluded.

67. D. Horowitz, supra Note 10, Ch. 1 makes a point along these lines. See, too, Kirp, supra, Note 1.

68. Debates in Britain over welfare versus rights based approaches to the delivery of government services have tended to be resolved in favor of the welfare approach. For a strong and well-known statement of this viewpoint see Titmuss, "Welfare 'Rights' - Law and Discretion," 42 Political Quarterly 113 (1971).

69. They are Weatherley, supra, Note 65; Stearns, Green and David, Local Implementation of PL 94-142, (Discussion Draft: SRI International, 1979); Kirst and Bertken, "Due Process in Special Education: Exploration of Who Benefits" Paper presented to the Special Education Collaborative Conference, Institute for Research on Educational Finance and Governance, Stanford University, 8-10 October 1980; Christine Hassell, supra Note 61; M. Budoff and A. Orenstein, Special Education Appeals Hearings: Their Form, and the Response to Their Participants (1979); Benveniste, "Implementation and Intervention Strategies: The Case of PL 94-142", in D. Kirp (ed), School Days, Rule Days: The Legalization and Regulation of Education (1983, forthcoming). Note the studies by Weatherley and Budoff and Orenstein are of the equivalent Massachusetts legislation, Chapter 766, the Comprehensive Special Education Law of 1972.

70. See Kirp and Jensen, "Law, Professionalsim and Politics: The Administrative Appeals Procedure Under PARC v Commonwealth of Pennsylvania (Unpublished Paper, 1982).

71. Stearns, et al. supra, Note 69, at 81.

72. Hassell, supra Note 61, at 52 ff.

73. Hassell, ibid.at 60 and Weatherley, supra Note 65.

74. Hassell, ibid. at 113.

75. Ibid.at 104.

76. Stearns et al., supra Note 69, at 79-82.

77. Ibid.

78. Kirst and Bertken, supra Note 69, at 6-7.

79. Stearns et al., supra Note 69, at 98.

80. Budoff, supra Note 69, at 5-1.

81. Nader, "Disputing Without the Force of Law", 88 Yale L.J. 998, 1007 (1979).

82. Quoted in H. L. Ross, Settled Out of Court 5 (1970). The figures he uses are for 1963 and taken from K. Davis, Administrative Law: Cases - Text - Problems 5 (1965).

83. Kirp, supra Note 4, at 840, n. 113.

84. Ross, supra Note 82; Mnookin and Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" 88 Yale L.J. 950 (1979); Weatherley, supra Note 65.

85. The phrase is borrowed from Mnookin and Kornhauser, ibid.

86. Budoff, supra Note 69, at 6-11, 6-12; Kirst and Bertken, supra Note 69, at 21; Stearns et al, supra, Note 69, 104. On private school placement see Budoff ibid. at 6-1; Kirst and Bertken, ibid; Stearns et al, ibid. at 104.

87. Kirst and Bertken, ibid. at 9.

88. Weatherley, supra Note 65, at 10. Interestingly Kirst and Bertken ibid. at 23, report that where poor people do go to hearings they have a higher success rate. They suggest, however, that this may be due to the more limited nature of their claims and to the fact that they were more frequently resisting rather than proposing changes.

89. Galanter, "Why the 'Haves' Come out Ahead: Speculations

on the Limits of Legal Change" 9 Law and Society Review 95 (1974); Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" 28 Am. Soc. Rev. 55 (1963); Handler, "Controlling Official Behaviour in Welfare Administration" supra Note 15.

90. Budoff reports a high degree of non-compliance by school districts with decisions unfavorable to them, and continuation of the conflict. Supra Note 69, Ch. 10.

91. Hirschman, Exit, Voice and Loyalty (1970).

92. See Note 88, supra.

93. Budoff, supra Note 69, at 9-1; Stearns et al., supra Note 69, at 104.

94. Budoff, ibid. at 9-1, 13-15, 14-27; Stearns et al., ibid. at 101.

95. Budoff, ibid. at 9-19.

96. Ibid. at 13-25; Stearns et al., supra, Note 69, at 104.

97. Budoff, ibid. at 9-29.

98. Ibid., Ch.13; Stearns et al, supra Note 69, at 108. Kirst and Bertken, supra Note 69, at 34 warn of

distortions in the allocation of public funds.

99. Budoff, ibid. at 13-24 - 13-25.

100. Kirst and Hertken, supra Note 69, at 29.

101. Budoff, supra Note 69, at 13-14.

102. Budoff, ibid.

103. Stearns et al., supra Note 69, at 103; Budoff, ibid. at 13-10.

104. See Note 97, supra. Compare Hassell, supra Note 61 who seems to attribute the pathologies of the school districts which have a number of hearings to "excessive legal intervention".

105. Evidence of Edwin W. Martin, Deputy Commissioner, Bureau of Education for the Handicapped, Office of Education, Department of Health, Education and Welfare in the Report of the House Sub-committee on Select Education 297, 299 (96th Congress, First Session, October 1979).

106. Evidence of Frederick J. Weintraub, Assistant Executive Director for Governmental Relations of the Council for Exceptional Children in the Report of the Sub-committee on Select Education, supra Note 105, 96, 107. The table

shows the appropriations and authorization figures for four years subsequent to passage of the legislation:

	AUTHORIZATION	APPROPRIATION
1978	315m	315m
1979	535m	465m
1980	1.2b	804m
1981	2.1b	862 - 874m.8*

* The figure was $874m., though this was not known at the time Weinraub gave evidence. See Pittenger and Kuriloff, supra Note 60, at 87.

107. The cutbacks for fiscal years 1982 and 1983 amount to 29.6%, Children's Defence Fund, A Children's Defense Budget: An Analysis of the President's Budget and Children 4 (1982).

108. On the question of the use of due process procedures in the context of school discipline, see Kirp, supra Note 4, and in schools generally, Pittenger and Kuriloff, supra Note 60, at 89-90.

109. Lon Fuller described such issues as "polycentric

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issues". "The Forms and Limits of Adjudication" 92 Harv.L.Rev. 353 (1978). Interestingly one of the examples given by Fuller, that of wage negotiations, has been handled in Australia by a full adjudication model since the turn of this century. Though periodically controversial, it seems to stand the test of time. For a description of this model, see Sykes, "Labor Arbitration in Australia" 13 Am. J. Comp. Law 216 (1964).

110. See Kirp, supra Note 4.

111. See Abel, supra Note 6.

112. See for example the three articles by Reich, "Midnight Welfare Searches and the Social Security Act", 72 Yale L.J. 1347 (1963); "The New Property", 73 Yale L.J. (1964); "Individual Rights and Social Welfare: The Emerging Legal Issues", 74 Yale L.J. 1245 (1965).

113. See Galanter, supra Note 89 and Handler, supra Note 13.

114. Nader, supra Note 81.

115. We owe a number of these points to a talk on legalization given by Philip Selznick, to the Berkley/Stanford Faculty Seminar on Law, Governance and Education, October 1980.

116. See, Note 11 supra.

117. See generally Fuller, supra Note 109.

118 Mills v Board of Education of the District of Columbia, 348 F. Supp. 1257 (1971).

119. Budoff, supra Note 69, at 8-48. See, too, Kirst and Bertken, supra Note 69 on the potential for distorting funds.

120. Budoff, ibid. Ch.12.

121. The recent case of Armstrong v. Kline, 476 F.Supp. 583 (ED. Pa., 1979) aff'd sub nom. Scanlon v. Battle, 629 F.2d 269 (3d Cir., 1980) maintained that in view of PL94-142 the 180 day limitation on the school year could not be maintained for seriously handicapped children. This may imply a very broad interpretation of "appropriate" which would exacerbate the potential for distortion of school finances, but cf. footnote infra. Legislative amendment on the lines suggested could prevent this.

122. Budoff, supra Note 69, Ch. 12. and Stearns et al., supra Note 69, 107.

123. Budoff, ibid.

124. See the discussion of law in the context of discrimination

in Mayhew, supra Note 5.

125. Quoted in Mayhew, ibid.at 275.

126. Weatherley, supra Note 64, at 73 and 141-50, points out the tensions involved in requiring bureaucracies to treat their clientele as individuals.

127. We are not alone in saying that the situation is poised to go either way, see Schlechty and Turnbull, "Bureaucracy or Professionalism", 29 Journal of Teacher Education, No. 6, 34 (1978). We think the terms of the resolution are more complex than Schlechty and Turnbull suggest in their proposals about teacher education.

128. On the subject of growing government intervention in the classroom see Atkin, supra Note 62,at 96:

> In such a climate the teacher might be forgiven if he or she feels whipsawed, disaffected and even resentful. Teachers, I think, have been highly desirous of responding to educational concerns featured in the mass media, and they see themselves as having tried earnestly and sometimes valiantly to meet the objectives that seem important at any given time for the schools; but they become confused and angry because of the rapid change in educational priorities their resistance to external influence stiffened. I believe that this resistance to

external influence, however beneficial that influence potentially may be, has been one unanticipated result of government activity in the curriculum field.

129. See Mashaw, "The Management Side of Due Process: Some Theoretical Litigation Notes on the Assurance of Accuracy, Fairness and Timeliness in the Adjudication of Social Welfare Claims", 59 Corn. L.Rev. 772 (1974).

130. 451 U.S. 1, 67 L.Ed. 2D 694, 101 S.Ct. 1531. Pennhurst was, of course, the institution attacked in the PARC case. The court was interpreting the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§.6001-6080, a companion act to PL94-142. Significantly, Justice Rehnquist, for the majority, said the Court would take much stricter view of rights provisions involving the states in expenditure of state money.